COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 25, 1998

PRINCE GEORGE ELECTRIC COOPERATIVE

For declaratory judgment

and CASE NO. PUE960295

PETITION OF

RGC (USA) MINERAL SANDS, INC.
and
RGC (USA) MINERALS, INC.

For declaratory judgment

ORDER ON PETITIONS FOR DECLARATORY JUDGMENT

On October 30, 1996, Prince George Electric Cooperative ("Prince George")[1] filed a petition requesting that the Commission declare that a proposed sale of electricity by Virginia Electric and Power Company ("Virginia Power" or the "Company") to RGC (USA) Mineral Sands, Inc. ("RGC")[2] would violate Virginia law and Prince George's property rights under a certificate of public convenience and necessity issued by the Commission.

[1] Prince George is an electric cooperative certificated to serve certain parts of the Counties of Sussex, Prince George, Dinwiddie, Surry, Southampton and Isle of Wight, Virginia.

[2] RGC (USA) Mineral Sands, Inc., ("RGC Sands") is a Delaware corporation authorized to transact business in Virginia. RGC Sands is a wholly-owned subsidiary of Associated Minerals (USA) Holdings, Inc., a Delaware corporation, which is a wholly-owned subsidiary of RGC (USA) Investments, Inc., a Nevada corporation. RGC Sands constructed and operates the mineral processing plant at issue in this case through its division RGC (USA) Mineral Sands, Inc.-Virginia. RGC's corporate structures are not germane to our decision in this case; therefore, we will refer to the various entities collectively as "RGC."

On November 18, 1996, RGC filed a counter petition, requesting that the Commission declare that Virginia Power has the right and the duty, pursuant to its certificate of public convenience and necessity, to sell electricity to RGC at RGC's delivery and metering point located within Virginia Power's certificated service territory.

The basic facts of this case are not in dispute. In the fall of 1995, RGC purchased a parcel of real estate (hereinafter, "Parcel A"), approximately 37 acres, that is wholly within the service territory of Prince George. Subsequently, it constructed a mineral processing plant on this site. RGC requested Virginia Power to be its electric provider and Virginia Power agreed, contingent on certain conditions being met. RGC then sought Prince George's permission to permit Virginia Power to serve RGC's plant since the plant is in Prince George's service territory. Prince George refused.

In the summer of 1996, RGC purchased another parcel of real estate (hereinafter, "Parcel B") that extends into Virginia Power's service territory. Parcel B is a strip of land approximately 30 feet wide that is contiguous to and extends south from Parcel A for a distance of approximately 4,380 feet. Parcel B is predominantly situated within Prince George's service territory; the boundary between the service territories of Virginia Power and Prince George lies approximately 4,000 feet south of the common boundary of Parcels A and B and approximately 380 feet north of the southern boundary of Parcel B. Parcel A and Parcel B share a common boundary for a distance of 35.56 feet; no public road, street or other property not owned by RGC separates Parcel A and Parcel B. Approximately 99.6% of the total land area of both parcels lies within Prince George's service territory; the remaining .4% lies within Virginia Power's service territory.

RGC began purchasing electricity from Virginia Power on May 7, 1997, subject to certain conditions.[3] Virginia Power delivers the electricity to a meter that the Company owns, located in its service territory.[4] The electricity flows from Virginia Power's meter over distribution facilities that RGC constructed, owns and operates to RGC's mineral processing plant.

The only issue in controversy is whether Virginia Power's sale of electricity to RGC violates the Utility Facilities Act under which certificates of public convenience and necessity are issued in Virginia. In her report issued on November 24, 1997, the Chief Hearing Examiner concluded that since the electric energy would be provided to RGC at a delivery point in Virginia Power's service territory, Virginia Power has the right and the obligation to provide electric service to RGC. For the reasons discussed below, we do not agree with the Hearing Examiner's findings and recommendations and will grant Prince George's petition.

Background

As stated above, Prince George filed its petition on October 30, 1996, and RGC filed its counter petition on November 18, 1996. On December 13, 1996, the Commission issued an order for notice and hearing. The Commission consolidated both petitions for review, appointed a hearing examiner to conduct further proceedings, and made Virginia

[3] The conditions are: (1) Virginia Power's agreement to provide the requested service is contingent upon the final outcome of any proceeding challenging the Company's right to provide the service; (2) RGC's execution of a service agreement with a minimum term of 15 years and a contract minimum demand; and (3) RGC's agreement to reimburse Virginia Power in full for all costs incurred for facilities should such facilities become useless in the event of a successful challenge to Virginia Power's provision of the service.

[4] The meter is located approximately 50-100 feet north of the southern boundary of Parcel B.

Power a party to this proceeding. Additionally, the Commission directed the parties to file a stipulation of agreed facts and legal issues in dispute and briefs.

On February 7, 1997, Old Dominion Electric Cooperative ("ODEC"), Prince George's electric supplier, filed a Motion to Intervene. The Motion was granted by the Hearing Examiner.

On February 24, 1997, the parties filed a Joint Stipulation of Facts, a List of Legal Issues in Dispute ("Joint Stipulation") and their briefs. On March 17, 1997, the parties filed a Supplemental Joint Stipulation of Facts and List of Additional Legal Issues in Dispute. Virginia Power also filed a brief, stating that it does not support or oppose either Prince George's petition or RGC's petition. The Company also stated that the petitions filed in this case raise an important policy question that needs to be resolved.

On June 24, 1997, Prince George filed a Motion for Leave to Amend its Petition for Declaratory Judgment. It stated that, on March 18, 1997, Virginia Power and RGC entered into an agreement for RGC's purchase of electricity from Virginia Power and that the transaction commenced on May 7, 1997. Prince George sought to amend its petition to request that the Commission find the aforesaid agreement null and void and that Virginia Power be permanently enjoined from selling electricity to RGC that would be consumed at any point within Prince George's service territory. The Hearing Examiner allowed Prince George to amend its petition.

On November 13, 1997, Kentucky Utilities Company d/b/a Old Dominion Power Company ("KU") filed a Motion to Take Judicial Notice of Additional Legal Authorities. KU stated that it is an interested party because it is involved in a proceeding currently before the Commission, in Case No. PUE960303, that involves issues similar to those

presented in this case. KU requested that three additional legal authorities that were not cited in the briefs filed by the parties in this case be considered, asserting that they are relevant to the issues in this case.

The Hearing Examiner's Report

On November 24, 1997, Chief Hearing Examiner Deborah V. Ellenberg issued her Report. The Hearing Examiner stated that although the Virginia Code provides for exclusive service territories under §§ 56-265.3 and 56-265.4, the concept and application of exclusive service areas are not challenged in this case. She framed the threshold question in this case as "whether the Commission, as a matter of policy, defines the territorial boundaries by point of delivery or point of use;" i.e., whether the right to serve a particular customer is based on the location of a facility to which the electric power is delivered or at which it is actually consumed.

The Hearing Examiner described three analyses that have been used to determine which utility should serve a customer in situations similar to RGC's; i.e., (i) the point of use test, (ii) the point of delivery test, and (iii) the geographic load center test. Under the point of use test, the location of the facilities consuming the electricity is the primary factor. The point of delivery test focuses on the point at which the electricity is delivered. Under this analysis, a utility may be allowed to sell electric power to a customer, as long as the delivery (or metering) point is situated within that utility's service territory, even if the electricity is subsequently transported into another utility's service territory. Under the geographic load center test, the utility that serves the majority of a customer's load generally is designated the provider for the entire load.

The Hearing Examiner considered certain cases from other jurisdictions provided to her by the parties that endorsed the point of use test and found that these cases generally were decided on the basis of certain policy concerns.[5] The Examiner identified the policy concerns that support the point of use test to include protecting the rights of certificated providers against encroachment; deterring the manipulation of the system by large customers with greater resources and the circumvention of exclusive territorial service grants; protecting residential customers from higher rates resulting from the departure of larger customers; and discouraging the duplication of facilities and waste of resources.

The Hearing Examiner found that the cases from other jurisdictions where the point of use test was adopted involved existing customers who sought to change to a different electric supplier. She found further that these policy concerns cited above are not as persuasive in a situation, such as here, where the customer has never been served by the utility certificated to serve the area where the power will be consumed. She stated that "[s]ince RGC is a new customer, there is no duplication of facilities or wasted resources resulting from RGC constructing its own distribution line and taking service from Virginia Power."[6] She also found that RGC's reasons for acquiring private property are not relevant if there are no adverse public consequences.

The Hearing Examiner further discussed telecommunications precedent that supports the application of the point of delivery test. She relied upon a Fourth Circuit case that involved a telephone subscriber that owned contiguous property in North

[5] See Hearing Examiner's Report at 7-9.
[6] Id. at 9.

Carolina and South Carolina.[7] The subscriber wished to locate its privately-owned switching equipment in North Carolina so that it could interconnect with a carrier in that state, even though its 300 privately-owned telephones were located in South Carolina. The Fourth Circuit found that the subscriber could lawfully do so because individuals have a federal right to use telephone equipment in a way that is privately beneficial as long as it is not publicly detrimental. The Hearing Examiner also relied upon a Commission case in which three residential customers whose homes were located in the certificated service territory of one telephone company were allowed to interconnect their privately-owned equipment on their own property to network interface devices in another telephone company's certificated service territory, using either hard wire or cordless phones to make the connection.[8] The Hearing Examiner concluded, citing Citizens, that "this Commission has already determined that one utility can provide service to delivery points located within its service territory even when the customers are using the service within the certificated territory of another utility."[9]

In addition, the Hearing Examiner viewed recent regulatory and legislative developments relating to the restructuring of the electric industry as supporting the application of the point of delivery test in the circumstances of this case. She noted that the General Assembly clearly supported customer responsive arrangements that do not result in public detriment when it, for example, enacted § 56-235.2 of the Code of Virginia to allow utilities to offer special rates, contracts or incentives when certain criteria are

[7] Fort Mill Telephone Co. v. FCC, 719 F.2d 89 (4th Cir. 1983) ("Fort Mill").
[8] Commonwealth of Virginia, At the relation of Citizens Telephone Co. v. The Chesapeake and Potomac Telephone Co. of Va., Case No. PUC840026, 1984 SCC Ann. Rep. 354 ("Citizens").
[9] Hearing Examiner's Report at 10.

met. The Hearing Examiner also noted the increasing number of rate design and service options that have often resulted in utilities' attracting customers that might have otherwise located elsewhere or pursued energy alternatives. Based on these considerations, the Hearing Examiner found that "[g]ood reason . . . exists to maintain the policy established in the Citizens case and continue to allow customer choice within the parameters of our existing statutory framework."[10]

The Hearing Examiner concluded that Virginia Power has the right and, indeed, the obligation to provide service to RGC's metering point located within Virginia Power's service territory. Her recommendation, however, was not based on the single fact that the meter was in Virginia Power's service territory. Rather, her analysis was strongly influenced by her findings that: (i) RGC would have been a new customer for Prince George and there would have been no reduction in Prince George's existing revenue stream; (ii) no duplication of facilities would result; (iii) no public road, street or other property not owned by RGC separated Parcel A and Parcel B; and (iv) in her view, granting RGC's petition would not result in direct, substantial or immediate injury to Prince George. The Hearing Examiner also concluded that Prince George and ODEC did not construct facilities to serve RGC; therefore, no costs would be incurred that are directly attributable to the loss of RGC as a customer that could create stranded costs.

Comments on and Exceptions to the Hearing Examiner's Report

Comments on the Hearing Examiner's Report were filed by Prince George, ODEC, KU, RGC and Virginia Power.

[10] Id. at 11.

Prince George urges rejection of the Hearing Examiner's findings and recommendations. It contends that what is at issue is "whether the integrity of exclusive service territories granted under the [Utility Facilities] Act will be preserved or whether certain individuals and businesses will be able to select their utility without regard to where the energy will be consumed."[11]

As an initial matter, Prince George asserts that the Hearing Examiner's Report omitted certain important facts. By way of example, it states that the facilities constructed by Virginia Power to serve RGC duplicated facilities Prince George had built that could have served Parcel A.[12]

Prince George argues that the approach recommended by the Hearing Examiner has been rejected by several other jurisdictions that require exclusive service territories and that have concluded that adoption of the point of delivery test would not advance public policy objectives. Prince George contends that the policy concerns identified by the other jurisdictions are essentially the same concerns embodied in Virginia's system of exclusive service territories and also apply in this case.[13] Prince George also contends that the recent legislative and regulatory activities related to the restructuring of the electric industry cannot be construed as support for the elimination of exclusive service territories in Virginia.

[11] Prince George Comments at 2.
[12] Id. at 5-6.
[13] Prince George asserts that other jurisdictions have found that the point of delivery test undermines the doctrine of regulated monopoly because it allows customers to manipulate the point of delivery, thus creating the need for duplicative facilities, and impairs the ability of utilities to discharge their duty to meet the needs of existing customers and to anticipate future needs and growth.

Prince George asserts that the Fort Mill and Citizens cases relied upon, at least in part, by the Hearing Examiner have no precedential value in deciding this case. More specifically, it argues that the Fourth Circuit's decision in Fort Mill turned on the customer's right under federal telecommunications law to use its telephone equipment in ways that are privately beneficial without being publicly detrimental and that to translate this right into support for the point of delivery test in Virginia "stretches the bounds of credulity."[14] Prince George further argues that, even if Fort Mill is deemed to be on point, the test applied by the Federal Communications Commission ("FCC") (i.e., private benefit and no resulting public detriment) cannot be met in this case, since RGC's private benefit would be outweighed by the public detriment that would result from undermining exclusive service territories.

Prince George contends that Citizens must be considered as limited to the specific facts of that case. Further, it argues that in view of the "overwhelming repudiation" of the point of delivery test in states that have statutory schemes similar to Virginia's with respect to regulating public utilities, "it is inconceivable that the Commission could have intended its holding in a case involving three residential customers to have the far-reaching implications ascribed to it by the Chief Hearing Examiner."[15] Prince George asserts that the decision in Citizens should be taken for no more than what it was--the Commission's "allowing several residential telephone customers to do as they wished when neither utility involved objected."[16]

[14] Prince George Comments at 13.
[15] Id. at 15-16.
[16] Id. at 16.

Further, Prince George argues that the Hearing Examiner's finding that Virginia Power's provision of service to RGC would not injure Prince George or result in public detriment is contrary to the evidence. Prince George states that much of its service territory is rural in character, includes substantial amounts of undeveloped land and has several thousand miles of shared territorial boundaries; therefore, "[i]t is unknown how many opportunities those shared boundaries might afford to existing or new customers to create a contrivance such as that created by RGC."[17] Prince George also states that it has had a legal obligation to provide electric service to the area in which Parcel A is located for nearly fifty years and that it has been required to plan and maintain the capability, and incur costs, to deliver such service as might at any time be needed at that location in order to meet its obligation. It argues that to allow another utility to provide service to an area not certificated to it "renders it impossible for the utility with the obligation to serve such areas to accurately forecast and plan for load growth and thereby negates one of the benefits afforded the public by the doctrine of regulated monopoly."[18]

ODEC also urges the Commission to reject the Hearing Examiner's approach. It points out that the Hearing Examiner's view differs from other jurisdictions with similar regulatory schemes that have addressed the same or similar situation. ODEC contends that the Hearing Examiner's rationale that the point of delivery test should be applied based on the distinction that RGC would be a new customer is short-sighted and fails to take into account the sound public policy considerations that underlie the doctrine of regulated monopoly. ODEC asserts that the Hearing Examiner's approach fails to take

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[17] Id. at 19.

into account the fact that Prince George will need to construct distribution lines to serve the area surrounding Parcel B, resulting in duplicated facilities and wasted resources. ODEC argues that the Report appears to assume that serious obstacles exist that would prevent similar situations from arising in the future, but there is no reason to believe that the repetition of RGC's situation would be difficult.

Additionally, ODEC states that Virginia Code § 56-234.3 requires utilities to plan, forecast and build to meet future load, which necessitates large expenditures and capital outlay. ODEC contends that the adoption of the "new customer point of delivery test"[19] would make it difficult for utilities to fulfill their statutory duty because utilities will be unable to forecast future load accurately. ODEC argues that the Hearing Examiner's recommended approach will inevitably lead to the construction of facilities that will not be fully utilized, with the result of driving up the cost of service for the remaining customers who would have to bear the responsibility for fixed costs that would have been spread over a larger customer base.[20] ODEC further argues that adoption of the point of delivery test for new customers would unfairly disadvantage customers who do not have the resources to locate near a territorial boundary or construct their own distribution lines. ODEC asserts that the point of delivery approach would violate the spirit of § 56-234 because it would result in special treatment for new customers and, in effect, would create an undesirable differentiation between border-area and non-border-area customers. For example, ODEC contends that some customers will attempt to manipulate the system to find ways to become "new" customers which would foster a "balkanization of electric

[18] Id. at 20.
[19] ODEC Comments at 7.

utility service arrangements [that] will almost certainly create friction and concern within the customer pool."[21]

Further, ODEC takes issue with the Hearing Examiner's reasoning that the new customer point of delivery test should be adopted in light of the General Assembly's desire to support expanded customer responsive arrangements in the electric utility industry. ODEC argues that this consideration "inappropriately anticipates and preempts the results of current legislative and regulatory processes."[22] ODEC states that the proper role for the Hearing Examiner is to decide cases solely on the basis of current law.

ODEC also contends that the Citizens case does not support the point of delivery test in this case, raising essentially the same arguments as Prince George. In addition, ODEC argues that Citizens is inapposite since the Commission in that case found that there would be no direct, substantial and immediate harm to the utility from which the customers migrated. In contrast, ODEC asserts, Prince George and ODEC have suffered a direct, substantial and immediate injury in the loss of approximately $650,000 in annual revenues Prince George would have received had RGC become a customer. ODEC also asserts that granting RGC's petition would result in public detriment in terms of the impact on utilities' ability to carry out their statutory duty to plan, forecast and build to serve anticipated load.[23]

KU filed comments requesting that the Commission adopt the point of use analysis for resolving disputes between electric suppliers under the Utility Facilities Act.

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[20] Id. at 7-8.
[21] Id. at 9.
[22] Id. at 10.
[23] Id. at 12-14.

Alternatively, it requests that the Commission limit the application of the point of delivery test to situations where the customer is not already served by the utility certificated to serve the area where the electric energy will be consumed. KU argues that the holding of the Citizens case should not be extended to electric utilities. KU also argues that the point of delivery test is "seriously flawed."[24] Specifically, KU asserts that adopting the point of delivery approach "eviscerates what the Virginia Supreme Court recognized as a 'property right . . . entitled to protection by the courts.'"[25]

KU contends that adoption of the point of delivery test would limit the Commission to considering only the location of the meter in territorial disputes, a matter that could be manipulated by the customer. It asserts that the Commission should base its decision in these disputes on facts that cannot be manipulated by the customer, such as the proximity of existing distribution lines to the area to be served, which supplier was first serving the area, the age, adequacy and dependability of existing facilities, and the prevention of the duplication of facilities supplying service to the area.

RGC filed comments arguing that the Hearing Examiner's findings and recommendations in her Report are appropriate and should be adopted by the Commission. Also, RGC states that any precedent established by this case may apply only to the limited circumstances where a new customer owns contiguous property situated within the service territory of more than one utility and any policy implications may be limited to such circumstances.

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[24] KU Comments at 4.
[25] Id., citing Town of Culpeper v. Virginia Electric and Power Company, 215 Va. 189, 194 (1974).

Virginia Power filed comments stating that it neither supports nor opposes the conclusions reached by the Hearing Examiner.

NOW THE COMMISSION, upon consideration of the record and the Examiner's November 24, 1997 Hearing Report, the comments and exceptions received thereto, as well as the applicable statutes and rules, is of the opinion and finds that Prince George's petition for declaratory judgment should be granted and RGC's counter petition should be denied. While we commend the Chief Hearing Examiner for her diligence and Report, we cannot adopt her findings and recommendations, for the reasons discussed below.

The Hearing Examiner correctly found that the two relevant Code sections are §§ 56-265.3 and 56-265.4 of the Code of Virginia. Section 56-265.3 provides that a public utility may not furnish public utility service within the Commonwealth unless it first obtains a certificate of public convenience and necessity authorizing it to provide the service in a particular service territory. Va. Code § 56-265.4 provides that:

> [N]o certificate shall be granted to an applicant proposing to operate in the territory of any holder of a certificate unless and until it shall be proved to the satisfaction of the Commission that the service rendered by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience; and if the Commission shall be of opinion that the service rendered by such certificate holder in such territory is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any such certificate shall be granted to an applicant proposing to operate in such territory.

Thus, § 56-265.3 requires that a public utility cannot provide service in a particular territory unless it first obtains a certificate of public convenience and necessity. Such a

utility also incurs certain duties and obligations.[26] Further, § 56-265.4 precludes utilities from operating in another utility's service territory unless the incumbent utility is providing inadequate service. Even then, the incumbent utility is afforded an opportunity to cure the inadequacy.

We find that §§ 56-265.3 and 56-265.4, read together, provide for exclusive service territories that should be afforded significant protection. Moreover, Commission and court decisions underscore the fact that Virginia law provides for a high degree of protection of territorial grants. For example, the Virginia Supreme Court has stated that the exclusive right to serve is a "franchise" and "a valuable property right" that "is entitled to the protection of the courts."[27]

We do not agree with the Hearing Examiner's conclusion that case law supports the application of the point of delivery test in this case. As discussed, the Hearing Examiner relied, in part, on the Fort Mill and the Citizens cases. The Fort Mill and Citizens cases involved situations where customers of a telephone company wanted service from a telephone company other than one in whose certificated area the customers resided. The Fourth Circuit concluded in Fort Mill that individuals have a federal right[28] to use telephone equipment in ways that are privately beneficial if such use does not result in public detriment, and it is apparent that the decisions in these two cases were based, at least in part, on the existence of this federal right.[29] None of the parties has suggested that

[26] See, e.g., § 56-234 of the Code of Virginia.
[27] Culpeper, 215 Va. 189, 194.
[28] Fort Mill, 719 F.2d at 92.
[29] Although the Commission did not rely specifically on Fort Mill in the Citizens case, the Fort Mill case was discussed by the Commission and it applied a test similar to the one the Fourth Circuit applied in Fort Mill. Citizens, 1984 SCC Ann. Rep. 354, 355-56.

customers of electric utilities have a comparable federal right. Moreover, the Citizens case, by its own terms, is carefully limited to telephone service. Contrary to the Hearing Examiner's view, we find that the Commission in Citizens did not establish the point of delivery test as the general policy of the Commission for all utilities.

With respect to the cases from other jurisdictions, while the Commission is not bound by the decisions of other states, our review of these cases indicates that there is little support for the point of delivery test.[30] In fact, we have not been made aware of any jurisdiction with a statutory scheme similar to Virginia's, providing for exclusive service territories, that has adopted the point of delivery test.

Contrary to the Hearing Examiner's conclusion, we find the cases adopting the point of use test are persuasive. In reaching their conclusions, these cases discuss and compare both the point of use and the point of delivery tests.[31] These analyses make clear

[30] The Hearing Examiner considered Public Service Company of Colorado v. Colorado Public Utility Commission, 765 P.2d 1015, 99 P.U.R.4th 549 (Colo. 1988); Great Lakes Carbon Corporation v. Arkansas Public Service Commission, 31 Ark. App. 54, 788 S.W.2d 243, 114 P.U.R.4th 382 (1990); Central Illinois Public Service Company v. Illinois Commerce Commission, 202 Ill. App.3d 567, 148 Ill.Dec. 61, 560 N.E.2d 363 (1990), appeal denied, 136 Ill.2d 542, 153 Ill.Dec. 371, 567 N.E.2d 329 (1991); Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987); Re Lukens Steel Company, 57 P.U.R.4th 524 (Pa. PUC 1984); Union Telephone Company v. Tipton Telephone Co. P.U.R.1933C 285 (Ind. PSC 1932); and In re: Establishment of Service Territory Boundaries Between Iowa Electric Light and Power Co., and D.E.K. Rural Electric Coop., Docket No. SPU-79-11 (Iowa SCC, 1981) Proposed Decision and Order (Issued March 20, 1981) and adopted by the Iowa State Commerce Commission on May 13, 1981, Docket No. SPU-79-11 ("D.E.K."). In all of these cases, with one exception, the state public utility commissions applied the point of use test. The one exception was the D.E.K. case in which the Iowa State Commerce Commission applied what the Iowa Supreme Court later characterized as the geographic load center test. See O'Brien County Rural Electric Cooperative v. Iowa State Commerce Corporation, 352 N.W.2d 264, 267-69 (Iowa 1984). None of these cases supports the point of delivery test and the Hearing Examiner distinguished these cases in large part because RGC was a new customer. The substance of these cases cannot be dismissed on this basis. Further, in a case involving a "new customer," the state public utility commission, and later the Mississippi Supreme Court, found that the point of use analysis was appropriate. See Capital Electric Power Assoc. v. Mississippi Power & Light Co., 218 So.2d 707 (Miss. 1968), 78 P.U.R.3d 242, 247-49, reh'g denied.

[31] See, e.g., Public Service Company of Colorado, 765 P.2d 1015, 1019-21; Central Illinois Public Service Company, 202 Ill.App.3d 573-74, 148 Ill.Dec. 61, 65-66, 560 N.E.2d 363, 367-68; Great Lakes Carbon Corporation, 31 Ark. App. 54, 60-62, 788 S.W.2d 243, 246-248; Lee County, 501 So.2d 585, 586-87.

that, in contrast to the point of use approach, the point of delivery test allows the essence of exclusive service territories to be destroyed by customers that can manipulate delivery points to avoid the supplier for their area. The utility is then left with an obligation to serve its entire territory, but with no assurance that it will be allowed to do so. Such circumstances make planning for and serving the remaining customers more difficult and can increase costs for both the utility and its remaining ratepayers.

Nor do we find support for the adoption of the point of delivery test based on recent legislative and regulatory activities that were intended to expand customer choice. The Hearing Examiner found that, in light of the potential restructuring of the electric industry, including the General Assembly's support for customer responsive arrangements, and since the Code does not prohibit a private citizen from operating its own distribution line for private use, the Commission should be reticent to deny customer choice where the law currently allows it.[32] In our view, current legislation that allows expanded customer choice in certain prescribed ways[33] does not eliminate the requirement of exclusive service territories.

Finally, we find that the point of delivery test, even with the limits and restrictions the Hearing Examiner would impose, does not comport with the protection afforded to certificated service territories by Virginia law. The law is designed to provide protection and certainty for service territories that the Examiner's approach does not recognize. Specifically, for example, if RGC is allowed to move its delivery point in order to be

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[32] Hearing Examiner's Report at 11-12.
[33] E.g., § 56-235.2 of the Code of Virginia.

served by Virginia Power by purchasing a 4,000 foot strip of land, why should a customer not be allowed to achieve the same result upon acquiring an 8,000 or a 20,000 foot strip of land? Moreover, in this case, Prince George would continue to have the obligation to serve properties on both sides of the 4,000 foot strip. It could not be certain, however, that it would be allowed to provide service to these areas since, for example, a customer adjacent to the strip could rent or buy part of the RGC strip or perhaps space on, or an interest in, RGC's poles to run its own line to obtain service from Virginia Power.[34]

We must decide this case in a manner that is consistent with, and effectuates, the policy established by the General Assembly of ensuring and maintaining the integrity of service territories embodied in the Utility Facilities Act. In view of the significant protection afforded territorial grants in Virginia, we find that Virginia Power cannot provide electric service to RGC's mineral processing plant. Although we appreciate RGC's desire to be served by Virginia Power,[35] we cannot countenance RGC's achieving this goal by purchasing a strip of land approximately 30 feet wide and almost a mile long in order to reach into Virginia Power's service territory to place the meter. We cannot allow the parties to use this device to do indirectly what clearly cannot be done directly. While we do not here adopt any absolute test and will always consider the practical

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[34] We do not address here what activities might require RGC to be considered a public utility.

[35] According to the Joint Stipulation at 5, Virginia Power estimated its annual cost of providing electricity to RGC at approximately $543,379, in comparison to Prince George's estimated annual cost of $650,536. Thus, apart from any other differential in costs, RGC would have saved approximately $107,157 on an annual basis if it were allowed to purchase its electricity from Virginia Power. We encourage all utilities to take advantage of the tools available to them, such as the availability of special rates, contracts or incentives under § 56-235.2 of the Code of Virginia, to demonstrate greater flexibility and become more competitive. The Code's requirement of exclusive service territories may protect utilities in situations such as the one involved here, but it does not and cannot protect utilities from customers choosing to locate in another service territory or state that offers lower rates or from generating their own electricity.

realities of each situation, we intend to ensure that our decisions enforce the Code's requirement of strong protection for the exclusive service territories of utilities in Virginia.

Accordingly, IT IS ORDERED that:

(1) RGC's petition for declaratory judgment is denied.

(2) Prince George's petition for declaratory judgment is granted insofar as we have determined that Virginia Power cannot provide electric service to RGC for its mineral processing plant.

(3) Virginia Power and Prince George, in consultation with RGC, shall submit to the Commission's Division of Energy Regulation within 30 days of the issuance of this Order a plan detailing how and when Prince George will begin providing service to RGC.